FILE
SEP 21
HAROLD B. WI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 412

HANOVER FIRE INSURANCE COMPANY,

Petitioner,

—against—

HAROLD W. HOLCOMBE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Hanover Fire Insurance Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

The numbered and lettered headings of this petition are designed to conform to similarly numbered and lettered paragraphs of Rule 23 of this Court.

1 (a)

Opinions Below

The findings of fact and conclusions of law of the District Court for the Southern District of Florida (Appendix, p. 7a) are not officially reported; nor have the opinions of the judges of the Court of Appeals for the Fifth Circuit (Appendix, p. 1a) yet been officially reported.

1 (b)

The Grounds on Which the Jurisdiction of This Court Is Invoked

(i) The judgment of the Court of Appeals for the Fifth Circuit, dated June 21, 1955, was entered the same day.

(ii) Petition for a re-hearing was filed on July 7, 1955 and was denied on August 5, 1955.

(iii) The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

1 (c)

The Question Presented for Review

In a case where no facts are in dispute and the sole issue is the seaworthiness of a cargo vessel which sailed on a 1200 mile voyage with only three men aboard so that lookout and engine room watches admittedly could not be maintained, is the Court of Appeals bound under Admiralty Rule 46½, Rule 52 (a) of the Federal Rules of Civil Procedure and the decision in *McAllister* v. *The United States*, 348 U. S. 19, by the District Court's negative conclusion that unseaworthiness has not been established when all of the authorities, including decisions of this Court, as well as common sense, are to the contrary.

1 (e)

Statement of the Case

The petitioner is a marine underwriter which issued its policy to the respondent insuring the Motor Ship "Doromar", owned by respondent. The petitioner refused to pay for the vessel's loss by fire during the policy term because of breach of the express warranty of seaworthiness contained in the policy.

Suit was filed by the present respondent against the present petitioner in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County in the State of Florida. The suit was removed on application of the petitioner to the United States District Court for the Southern District of Florida, Miami Division, on the ground of diversity of citizen-

ship, the plaintiff being a citizen of the State of Florida and the defendant a citizen of the State of New York.

None of the facts of the case are in dispute.

The "Doromar" was a motor vessel 109′ in length and 18′ abeam, flying the Honduran flag. She was powered by four Diesel engines geared to two propellers. The pilothouse was at the forward end of the vessel on a deck above the main deck. The engine room was aft, down in the hold. The galley was on deck aft of the engine room.

The engines could only be controlled by an engineer on watch in the engine room for there were no controls of the engines from the pilothouse.

The respondent placed in command of the "Doromar" a man who had master's licenses issued by Honduras, Panama and Nicaragua. These licenses were issued upon request and without any examination as to his qualifications. He testified that he was ignorant of celestial navigation.

The engineer of the "Doromar" had no license. He had been picked up in the Bahamas and had served on the vessel for just a few weeks.

In addition to the men serving as master and engineer there was on board a third man picked up in the Bahamas and signed on as cook although it is said that he was also an experienced seaman. He had been on the vessel only a few weeks.

The vessel, with a cargo of machinery on board, sailed from Miami on August 9, 1953, for the Panama

Canal, a voyage of about 1200 miles, which would require something over four days. This voyage required that the vessel skirt along the Cuban Coast, thence through the Yucatan Channel and, following the usual lane of travel, she would skirt various islands, rocks and shoals en route.

On four voyages on which the "Doromar" had sailed from Miami prior to her last voyage, she had been manned with from 5 to 9 men. On a voyage from Santiago, Cuba, to Miami—one of some 750 miles—she had been manned by five men. On a voyage from Nassau to Miami she had been manned by seven men.

On the voyage on which the "Doromar" was lost, *i. e.*: the voyage of 1200 miles from Miami to Panama, it was planned for her to be manned by five men. However, one man quit in Miami a few days before the vessel sailed and another did not show up when the vessel was ready to sail. The "Doromar" sailed with but three men; and the engineer and cook were promised a bonus because the vessel was sailing shorthanded: the engineer would have to stand longer watches and the cook would have to stand a deck watch. Because of the short crew, before sailing it was arranged for the engineer to sleep in the wheelhouse.

The respondent knew that the vessel had but four men when she cleared at the Custom House and but three men which she sailed on her voyage.

The master, engineer and cook of the "Doromar" stood four-hour watches at the wheel while sitting down. When the engineer was not at the wheel he looked over the engines once in awhile. There was

no suggestion that the cook had anything to do with the engines or that he was qualified to handle them.

The "Doromar" was navigating in a well traveled lane. Shortly after the fire which destroyed the "Doromar", two vessels came up one of which picked up the men of the "Doromar". About an hour before the fire, two other vessels had passed them. In such a lane the "Doromar" could not possibly be navigated safely, manned as she was, for with no lookout and no one in the engine room to stop the engines in an emergency, the danger of collision was always present.

Fire broke out in the engine room of the "Doromar" at about 6 o'clock on the morning of August 12th, three days after the "Doromar" had sailed from Miami, when the vessel was about 104 miles south southwest of the westerly tip of Cuba. The master was then at the wheel; the engineer was asleep on the floor of the wheelhouse; the cook was in the galley preparing breakfast. There was no one in the engine room and there had been no one there for some three hours.

The exact cause of the fire was not established. As the District Court pointed out, it may well have resulted from overheating of the bearings or valves of the engines or from other causes brought about by inattention; and "the presence of a member of the crew at the origin of the fire might well have avoided the destructive effect of the fire" (Appendix, p. 10a).

After the fire broke out it was impossible to stop the engines for, when the engineer was awakened, he could not go down into the engine room because of the smoke; and there was no way of stopping the

engines from above. Before abandoning the "Doromar" the master turned the wheel hard left and the vessel sailed at full speed in a circle for an hour or so, presumably until the fire in the engine room caused the engines to seize or until the oil was consumed.

The Opinions Below

The District Court agreed that determination of the seaworthiness of the "Doromar" required consideration of the sufficiency and ability of the men who manned her, *i. e.:* seaworthiness required that she have (Appendix, p. 9a)—

> "a proper crew to adequately navigate the vessel, to avoid collision or other mishaps incident to navigation, to keep proper lookouts above deck and to adequately inspect the propulsion machinery of the vessel, to keep the engines properly oiled and supplied with oil, to answer signals from the helmsman, and to keep watch in and around the engine room to prevent sudden and unforeseen disasters."

As the vessel was manned with only three men, of course it was impossible at all times during a four day voyage, to have a man navigating the vessel, to have another "to keep proper lookouts above deck", and to have a third man "to keep watch in and around the engine room". Nevertheless, the District Court held that the petitioner had not carried the burden of proving that the vessel was improperly manned and, therefore, unseaworthy, because respondent's experts, expressed the opinion that she was seaworthy.

The District Court also held that even if the vessel were found unseaworthy the petitioner had the burden—

> "to connect the fire with the unseaworthiness to the extent that it is more reasonable to believe that the fire resulted from unseaworthiness than otherwise."

In this, of course, the court was wrong.

Imperial Fire Ins. Co., etc. v. *County of Coos,* 151 U. S. 452 at p. 462;
Robinson et al. v. *Home Insurance Co.,* 73 F. (2d) 3 at p. 4 (C. A. 5);
Aetna Ins. Co. v. *Houston Oil etc. Co.,* 49 F. (2d) 121 at p. 124 (C. A. 5);
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Red Top Brewing Co. v. *Mazotti,* 202 F. (2d) 481 at p. 482 (C. A. 2);
Canton Insurance Office Ltd. v. *Independent, etc.,* 217 Fed. 213 (C. A. 9);
Smith v. *Northwestern F. & M. Ins. Co.,* 246 N. Y. 349 at p. 362;
Arnould on Marine Insurance, 14th Ed. Vol. 2, Sec. 688.

Perhaps because counsel for respondent conceded on argument that there need be no causal connection between the loss of the vessel and unseaworthiness to vitiate the policy, the majority of the Court of Ap-

peals merely dealt with the issue of seaworthiness and held that under *McAllister* v. *The United States,* 348 U. S. 19, the Appellate Court could not substitute its opinion for that of the Trial Judge.

1 (h)

Argument for Allowance of the Writ

The petitioner appreciates that it is not entitled to have its case considered by this Court merely because it has suffered an injustice. The case, however, concerns the proper administration of justice in all Courts of Appeal, and it involves a distinct departure from the prior decisions of this Court, and of other Courts of Appeal, on what constitutes a properly manned vessel as a matter of law.

The majority of the Court of Appeals held that they were bound by the decision in *McAllister* v. *The United States,* 348 U. S. 19, to affirm the negative conclusion of the District Court that the unseaworthiness of the M. V. "Doromar" had not been established. The petitioner submits that the majority of the Court below were derelict in their duty in not reversing the judgment of the District Court—a judgment which is clearly wrong as a matter of law and of common sense and, indeed, verges on the fantastic.

To be seaworthy a vessel must be properly manned.

McLanahan v. *The Universal Ins. Co.,* 1 Peters (26 U. S.) 170 at p. 182;
The Framlington Court, 69 F. (2d) 300 at p. 304 (C. A. 5);

In re Pacific Mail S. S. Co., 130 Fed. 76 at p. 82 (C. A. 9);
Keen v. *Overseas Tankship Corp.,* 194 F. (2d) 515 at p. 517 (C. A. 2);
Boudoin v. *Lykes Brothers S. S. Co.,* 348 U. S. 336;
Smith v. *Northwestern F. & M. Ins. Co.,* 246 N. Y. 349 at pp. 356-7;
Corpus Juris Secundum, 45 C. J. S. par. 652, pp. 565-6;
Arnould on Marine Insurance, 14th Ed., Vol. II, secs. 721-3.

This Court has repeatedly held that a vessel sailing the high seas must at all times be manned with a lookout stationed at her bow, independent of the man at the wheel. Other authorities are to the same effect, and there is no authority known to us to the contrary.

International Rules of Navigation, 33 U. S. C. 147a;
Griffin on Collision, Chapter VII;
Chamberlain v. *Ward,* 21 Howard (62 U. S.) 548, at 570-1;
The Ariadne, 13 Wallace (80 U. S.) 475, at 478;
The Ottawa, 3 Wallace (70 U. S.) 268;
The Orion, 26 F. (2d) 603 (C. A. 1);
The Genesee Chief, 12 Howard (53 U. S.) 443, at 462.

Yet the Court below held that the "Doromar", admittedly manned in such a manner that it was impossible for her to maintain a lookout forward at all times, was, nevertheless, properly manned and seaworthy. Such a decision is irreconcilable with all of

the established law. Apart from the error of law which is present, this decision, as pointed out by Judge Rives in his dissenting opinion, represents a dangerous relaxation of the high standards of seaworthiness essential to prudent and safe navigation.

Equipped as the vessel was with four engines below deck which could not be controlled from the bridge, it was imperative that there be an engineer on watch in the engine room at all times. Manned as the "Doromar" was, this was impossible.

Not only do the authorities establish the unseaworthiness of the "Doromar", but common sense requires that conclusion because of the impossibility at all times of posting a lookout at the bow and an engineer in the engine room. If there were no expert testimony supporting the thesis of unseaworthiness and a mass of expert testimony to the effect that the vessel was seaworthy, a finding of unseaworthiness would still be required.

Reversal of the negative conclusion of the District Court did not require that the Court of Appeals rely upon its "own skill in maritime affairs". It merely required a reading of the decisions of this Court requiring that a vessel be manned with a lookout; and the exercise of common sense so far as concerns the inability of the "Doromar" to have an engineer on watch in the engine room.

In *McAllister* v. *The United States* (*supra*), this Court said that a Court of Appeals

> "may not set aside the judgment below unless it is clearly erroneous."

This Court went on to say:

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed' * * *."

Rule 52(a) of the Federal Rules of Civil Procedure and *McAllister* v. *The United States* stand for the salutary principle that findings of fact made by a District Court should not be reversed lightly, for a Trial Court is in the best position to pass on the credibility of witnesses appearing before it. Nevertheless, the conclusion of a District Court that negligence has or has not been established "is not a finding of fact which must be 'clearly erroneous' to be subject to review". Such a conclusion "involves a comparison of the contrasted values; the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, which is the usual hallmark of a jural act".

> *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro (The Pocone),* 159 F. (2d) 661 at 665 (C. A. 2).

We submit that a conclusion of seaworthiness or unseaworthiness on undisputed facts, is of the same character.

It is, we think, important that this Court make it clear to Courts of Appeal that *McAllister* v. *The United States,* Admiralty Rule 46½ and Rule 52(a) of the Federal Rules of Civil Procedure do not justify dereliction of the duty of an Appellate Court to see that justice is done where the evidence is as clear as it is here, that "a mistake has been committed".

The affirmation of the whimsical judgment of the District Judge reflects discredit on the administration of justice in the Federal Courts and, we submit, should not be tolerated.

The dissenting opinion of Judge Rives (Appendix, p. 3a), wherein he outlines the undisputed factual testimony and the reasons why he was "left with a definite and firm conviction that a mistake has been committed", expresses the petitioner's position succinctly and clearly.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings of the case entitled on its docket "HANOVER FIRE INSURANCE COMPANY, Appellant, v. HAROLD W. HOLCOMBE, Appellee, Docket #15,406"; and that the said decree of the United States Court of Appeals for the Fifth Circuit be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as this Court may seem meet and just; and your petitioner will ever pray, etc.

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APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit

Before HUTCHESON, *Chief Judge,* and RIVES and TUTTLE, *Circuit Judges.*

HUTCHESON, *Chief Judge*: Alleging that the vessel "Doromar" had been insured by the defendant against loss by fire, and that, while the policy was in force, the "Doromar" burned and sank and became a total loss, plaintiff sued to recover the loss.

The defendant, admitting that, under the terms of the policy, burning and sinking were perils insured against, pleaded as a separate and complete defense an express warranty of seaworthiness and that the vessel was unseaworthy at the time of the commencement of the voyage.

While the answer did not specify wherein the vessel was unseaworthy, the issue tendered and tried under the answer was that the "Doromar" was insufficiently manned and, therefore, unseaworthy for the voyage from Miami to Panama Canal.

In support of its claim, the respondent proved that the vessel broke ground for the voyage with a crew of three men, and offered opinion testimony of several witnesses that this was an insufficient complement and the vessel was, therefore, unseaworthy.

On his part plaintiff called opinion witnesses who expressed the view that the "Doromar" was properly manned.

At the conclusion of the testimony, the district judge, stating "The testimony on the issue is extremely complicated, and the court concludes it does not pre-

ponderate in favor of the defendant, and, therefore, the defendant has not carried the burden of proof," found for plaintiff and gave judgment accordingly.

Appealing from that judgment, defendant is here insisting not that it did not have the burden of proving unseaworthiness[1] but that the finding that it did not carry its burden was clearly erroneous and that the judgment may not stand.

We do not think so. In *McLanahan* v. *The Universal Insurance Co.*, 1 Peters 170, cited by defendant as its leading authority, the court at page 184 said:

> "What is a competent crew for the voyage; at what time such crew should be on board; what is proper pilot ground; what is the course and usage of trade in relation to the master and crew being on board when the ship breaks ground for the voyage; are questions of fact, dependent upon nautical testimony; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs."

From this utterance to that in the latest decisions on this question, the view of the courts has been uniform. What, in effect, appellant asks us to do in this case is "assuming to ourselves the province of a jury and judicially relying on our own skill in maritime affairs," to substitute our opinion for that of the trial judge. The district judge could not, he did not, in determining the issue, rely on his own skill in mari-

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[1] *New York & P. R. S. S. Co.* vs. *Aetna Ins. Co.*, 204 F. (2d) 255, at 258; *Fireman's Fund Ins. Co.* v. *Globe Nav. Co.*, 236 Fed. 618.

time affairs. He was bound to decide the case on his opinion of the weight of the evidence in the light of the rule that defendant bore the burden of establishing its defense. Refusing to judicially rely on his own skill in maritime affairs and deciding the case upon the evidence as enjoined upon him by the decisions, he found the issue against the defendant. To set his finding aside as clearly erroneous, we are not furnished with any basis, we think we have none, except judicially relying on our own skill in maritime affairs. Couch, Cyclopedia of Insurance Law, Vol. 5, Section 1089, thus correctly states the rule controlling here:

> "The presumption of law is that every vessel is seaworthy until the contrary is proved, and the burden of proving that a vessel is unseaworthy lies upon the insurance company."

Appleman on Insurance Practice, Vol. 21, Section 12237, page 120, is to the same effect. We think we cannot under this rule reverse the judgment without denying to the district judge's findings the weight they are entitled to under Admiralty Rules, No. 46½, *McAllister* v. *United States*, 348 U. S. 19.

The judgment is AFFIRMED.

RIVES, *Circuit Judge*: I dissent.

RIVES, *Circuit Judge*, Dissenting:

Upon a careful consideration of the entire evidence, I am "left with the definite and firm conviction that

a mistake has been committed,"[1] and in good conscience, I must therefore respectfully dissent. I would be the last to rely on my own skill in maritime affairs,[2] for I have no such skill; but this is not a jury case and a judge, of course, cannot transfer to so-called expert witnesses his duty and responsibility to arrive at a just conclusion from the evidence.

The policy contained an express warranty of seaworthiness for each voyage.

There was no dispute in the factual, as distinguished from the opinion, evidence. The "Doromar" was a motor vessel 109′ in length and 18′ abeam. She was powered with four Diesel engines geared to two propellers. The pilothouse was at the forward end of the vessel on a deck above the main deck. The engine room was aft, down in the hold. The galley was on deck aft of the engine room. The engines could only be controlled by an engineer on watch in the engine room for there were no controls of the engines from the pilothouse.

The vessel sailed from Miami on August 9, 1953, for the Panama Canal, a voyage of about 1200 miles which would require something over four days. This voyage required that the vessel skirt along the Cuban Coast, thence through the Yucutan Channel and, following the usual lane of travel, she would skirt various islands, rocks and shoals en route.

On this voyage the "Doromar" was manned by but three men, the master, the engineer and the cook.

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[1] *United States* v. *Gypsum Co.*, 333 U. S. 364, 395; *Cf.* Admiralty Rule 46½; *McAllister* v. *United States*, 348 U. S. 19, 20.

[2] *McLanahan* v. *The Universal Insurance Co.*, 1 Peters 170, 184, cited in the majority opinion.

Fire broke out in the engine room of the "Doromar" at about 6 o'clock in the morning of August 12th, three days after the "Doromar" sailed from Miami, when the vessel was about 104 miles south southwest of the westerly tip of Cuba. The master was then at the wheel; the engineer was asleep on the floor of the wheelhouse; the cook was in the galley preparing breakfast. There was no one in the engine room and there had been no one there for some three hours. The district court found that, "The presence of a member of the crew at the origin of the fire might well have avoided the destructive effect of fire."

The Deputy Collector of Customs at Miami testified that he had been able to locate four clearances of the "Doromar" at Miami between 1948 and 1953. On none of these voyages did the vessel sail with but three men and on one voyage to Baracoa, Cuba, she had nine men. There was no testimony that the vessel had ever before this voyage sailed with a crew of only three men.

The defendant offered the opinion testimony of five qualified experts who testified in effect that, manned as the "Doromar" was when she sailed from Miami on the voyage to Panama Canal, she was insufficiently manned and, therefore, unseaworthy. They pointed out that it was particularly necessary on the "Doromar" for there to be an engineer on watch at all times because there was no control of the engines from the pilothouse. They also pointed out the necessity for a lookout. Manned as the "Doromar" was, she was a danger not only to herself but to other vessels: she could not have a lookout to pick up approaching vessels, which is important in this much

travelled lane and particularly important in thick weather or at night; nor an engineer always on watch to maneuver or stop the engines in the event of impending collision or fire.

The plaintiff offered the opinion testimony of three expert witnesses, who expressed the view that the "Doromar" was properly manned with but three men. The experience of one of these experts related to ships whose engines could be controlled from the wheelhouse. He testified that he would not require the engineer to stand wheel watches. Plaintiff's second expert witness agreed that on vessels where there was no control of the engines from the wheelhouse, there was always an engineer on watch in the engine room, and on the necessity of maintaining a lookout particularly with poor visibility. It was his view that the men could stand continuous watches for 37 hours at the time. Plaintiff's third expert witness admitted that he knew of no vessel of the type of the "Doromar" which had sailed out of Miami with a crew of only three men. All of the witnesses admitted the necessity of a constant lookout independent of the man at the wheel.[3]

The better reason and the clear weight of the opinion testimony seems to me to rest with the defendant. Even if all of such testimony had been with the plaintiff, the court would still be under the duty to judge of its credibility and arrive at its true value. For

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[3] See 33 U. S. C. A. 147(a) (Rule 29); *Chamberlain* v. *Ward*, 21 Howard (62 U. S.) 548 at pp. 570-1; *The Ariadne*, 13 Wallace (80 U. S.) 475 at p. 478; *The Ottawa*, 3 Wallace (70 U. S.) 268; *The Orion*, 26 F. 2d. 603 (1st Cir.); *The Genesee Chief*, 12 Howard (53 U. S.) 443 at p. 462.

example, if the vessel had been manned by one man or by two men, I anticipate that no amount of opinion testimony could have convinced the Court that it was seaworthy. Manned as it was by only three men on a voyage requiring more than four days on this lane travelled by many other ships, with no control of the engines from the wheelhouse, with the factual testimony undisputed, and with the expert opinion testimony differing as has been described, I am left with the definite and firm conviction that the "Doromar" was not insured under appellant's policy on the voyage on which she was lost, because of breach of the policy warranty of seaworthiness.

It seems to me that this decision tends toward a dangerous relaxation of the high standard of seaworthiness essential to prudent and safe navigation. I, therefore, respectfully dissent.

Findings and Conclusions of the District Court for the Southern District of Florida, Miami Division

FINDINGS OF FACT:

1. The Court has jurisdiction of the parties and the subject matter.

2. On July 30, 1953, the defendant accepted the risk, and on August 11, 1953, the defendant issued a policy of insurance to the plaintiff covering the M/V "Doromar", effective of and from noon July 30, 1953, to noon July 30, 1954, in the sum of $50,000.00.

Findings and Conclusions of the District Court for the Southern District of Florida, Miami Division

3. At the time the policy was issued the M/V "Doromar", a 109-foot steel hulled, converted yacht type vessel, powered by four Deisel engines, twin screws and with engineroom controls, was at sea on a voyage from Miami, Florida, to the Panama Canal Zone, with a crew of a captain, an engineer and a seaman-cook.

4. On the morning of August 12, 1953, while at sea the M/V "Doromar" caught fire and burned, resulting in the sinking of the vessel. Fire was a peril insured against by the policy issued.

5. The liability under the policy attached before the vessel departed from Miami. The policy bears a date subsequent thereto, and the rate was to be determined later than the departure date, incident to a settlement of the rate to govern when the vessel was to travel in seas authorizing a higher rate. But the provision of the policy with reference to seaworthiness became effective before departure.

The sufficiency of the number and character of the crew as being a part of seaworthiness is to be tested not only as of the time of departure, but was a continuing duty in the sense that these qualifications of seaworthiness were to be present throughout the voyage contemplated upon departure from Miami. Stated differently, there was a duty upon the insured to furnish a proper crew for the voyage contemplated to be undertaken and executed.

Findings and Conclusions of the District Court for the Southern District of Florida, Miami Division

6. The burden of proof is on the insurer not only to go forward with the testimony, but the burden is on the insurer to show by a preponderance of the evidence unseaworthiness as set up in its pleading. Fire occurred and the vessel was lost, and under the testimony the insurer is liable unless the insured has breached its warranty as to seaworthiness.

7. The testimony is first viewed by the Court from an abstract view; that is, the furnishing of a competent crew, in number and character of personnel, as that obligation was to be met by the insured as to this particular voyage. This abstract view embraces the matters of furnishing a proper crew to adequately navigate the vessel, to avoid collision and other mishaps incident to navigation, to keep proper lookouts above deck and to adequately inspect the propulsion machinery of the vessel, to keep the engines properly oiled and supplied with fuel, to answer signals from the helmsman, and to keep watch in and around the engineroom to prevent sudden and unforeseen disasters. The testimony on this is extremely conflicting and the Court concludes it does not preponderate in favor of the defendant and, therefore, the defendant has not carried the burden of proof.

8. Considering the testimony less abstractedly and with more concrete application, another phase of the matter is considered by the Court. From the testimony the Court cannot conclude just what was the cause of the fire. There was no explosion which could

come from fire coming into touch with inflammable material. The cargo was machinery. The fire could have occurred from a negligent act connected with smoking by a crew member; it could have occurred from the burning out of bearings, valves or other parts of the machinery. The presence of a member of the crew at the origin of the fire might well have avoided the destructive effect of the fire. There is no burden on the insurer to show by positive evidence that an inadequacy of the complement of the crew was the proximate cause of the fire. The very nature of the case would not require that. However, there is a duty on the insurer to connect the fire with the unseaworthiness to the extent that it is more reasonable to believe that the fire resulted from unseaworthiness than otherwise. I am of the opinion and hold that the insurer has not carried its burden of proof, considered from this viewpoint.

9. The plaintiff is due and owing of the defendant the sum of $50,000.00.

10. The plaintiff is due and owing of the defendant the sum of $10,000.00 as a reasonable attorney's fee for their services rendered in this case.

CONCLUSIONS OF LAW:

1. The plaintiff should have and recover of the defendant the sum of $60,000.00, with interest from date of decree.

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2. The costs of this action should be taxed by the Clerk against the defendant.

3. A judgment should be drawn to conform to these findings and submitted to the Court for signature.

Dated at Miami, Florida, this 15th day of October, 1954.

(Signed) JOHN W. HOLLAND.
Chief Judge.

Judgment of the United States Court of Appeals for the Fifth Circuit

Extract from the Minutes of June 21, 1955.

HANOVER FIRE INSURANCE COMPANY,

No. 15406. versus

HAROLD W. HOLCOMBE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Hanover Fire Insurance Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

RIVES, *Circuit Judge,* dissenting.